

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BETH HORTON

Claimant

VS.

DAIMLER CHRYSLER CORPORATION

Respondent

AND

LIBERTY INSURANCE CORPORATION

Insurance Carrier

Docket No. 1,034,073

ORDER

Both parties requested review of the October 28, 2008 Award on Remand¹ by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on February 3, 2009.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Andrew D. Wimmer, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that there is no dispute as to the ALJ's conclusions on the issues of average weekly wage (\$769.40 per week) or the nature and extent of the claimant's permanent partial impairment (18 percent to the whole body).

ISSUES

The Board originally heard this matter on October 7, 2008 for the sole purpose of determining whether claimant sustained an accidental injury that arose out of and in the

¹ Hereinafter referred to as the "Award".

course of her employment. The parties agreed that in the event claimant prevailed on that issue, the matter would be remanded to the ALJ for a determination on the remaining issues.

On October 28, 2008², the ALJ issued his Award granting claimant an 18 percent whole body permanent partial impairment based upon an average weekly wage of \$769.40 per week. The ALJ denied claimant's request for temporary total disability (TTD) benefits. The ALJ specifically noted there was a lack of evidence within the record or a discussion in claimant's submission brief on either the TTD or the medical issues and therefore he denied claimant's request for additional TTD. But, he also found that although the bills "did not, on their face, give sufficient information to show what the services were and that they were related to treatment of the vocal chord condition"³, respondent should nevertheless be liable for "all reasonable and necessary treatment for this injury, subject to the workers compensation fee schedule."⁴

Claimant appeals both these findings involving her entitlement to additional TTD and payment of medical bills, asserting that there is sufficient evidence within the file to substantiate her claim.

Respondent appeals as well taking issue with "compensability, medical causation, personal injury by accident, and injury arising out of and in the course of employment."⁵ Respondent maintains this claim is not compensable because claimant has failed to meet her evidentiary burdens on the causal connection between her work activities and her spastic dysphonia and should be reversed. Alternatively, respondent argues the ALJ's most recent findings with respect to TTD should be affirmed. Conversely, respondent argues that claimant has failed to put forth sufficient evidence to establish that the medical bills attached to the Regular Hearing are causally related to her vocal condition. Thus, respondent should not be held liable for those bills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

² The parties were apparently not given an opportunity to submit briefs or offer any oral argument before the ALJ issued his Award. Neither party requested that the record be reopened for additional evidence.

³ ALJ Award (Oct. 28, 2008) at 2.

⁴ *Id.*

⁵ Respondent's application for review (filed November 7, 2008). At oral argument respondent conceded that the compensability arguments advanced in this portion of the appeal are merely for purposes of preserving the argument should this matter proceed further in the appellate process. Claimant's claim was found compensable by the Board and that issue is now res judicata.

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Although respondent has appealed the underlying compensability of the claimant's claim, that issue was conclusively decided by the Board's October 27, 2008 decision.⁶ Thus, the compensability of claimant's claim will not be revisited. Accordingly, the only issues to be addressed herein involve the ALJ's denial of claimant's request for TTD benefits and the payment of outstanding medical bills as itemized at the Regular Hearing.

The ALJ noted as follows:

The claimant alleged periods of temporary total disability at the regular hearing, but did not cite this as an issue in her submission letter. The record did contain a July 11, 2006 letter from the respondent to the claimant, advising the claimant that she would need a medical release from her physician to return to work. This suggests that she was off work for some period of time, but there is not sufficient evidence in the record to determine any specific periods of time when the claimant was temporarily incapable of substantial gainful employment.⁷

Despite their absence from the claimant's submission letter, the ALJ listed both TTD and medical as issues his original award. Also, the ALJ's statement that there are no "specific periods of time" contained within the record is not entirely accurate. The prehearing settlement conference sheet reflects dates the claimant was, at least as of that time, claiming she was unable to work. And at the Regular Hearing claimant provided an exhibit that itemized the dates she maintains she was unable to work a full day or in some instances, a partial day. Her testimony was less than illuminating as to why she could not work on those days given that she was being accommodated by her employer, and there is nothing within the record that suggests that she was directed not to work by any physician. Nonetheless there is testimony in the record from which one could glean the dates at issue. Thus, respondent's contention that the dates of TTD being sought was a mystery is disingenuous.

In her brief to the Board, claimant failed to recite these days and merely pointed out that at the Regular Hearing the issue of TTD was discussed and that "evidence was introduced concerning these issues."⁸ Claimant also points out that the ALJ's earlier award, dated July 3, 2008, indicated that TTD and medical were issues to be determined.

⁶ Board Order, 2008 WL 4857923 (October 27, 2008).

⁷ ALJ Award (Oct. 28, 2008) at 2.

⁸ Claimant's Brief at 1 (filed December 9, 2008).

It is true that claimant testified that she missed work over a period of 72 days and that she prepared an exhibit which itemizes those days. Her exhibit shows that she was gone from work beginning January 17-22, 2006, February 1-6, 2006 and then from May 23 to July 17, 2006.⁹ Claimant went on to testify that the total number of days was 72 days, with 10 of those days as half days. There is no indication within this record that claimant received sick pay or other compensation due to her absence. There is no physician's release, nor any indication as to why claimant could not work during these periods. She had been reassigned at various times to the mailroom and was no longer required to address customer's calls on the telephone. That assignment became permanent in July 2006.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁰ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹¹

Here, the only evidence available to the Board is the claimant's own testimony. She maintains she was off work for a total of 72 days, 10 of those days being half days, due to her work-related condition. While she may well not have worked, there is no explanation as to why she did not work. Claimant's injury involved her voice and she was assigned (at least some of the time) to the mail room. Her own testimony suggests that after January 17, 2006 she was temporarily reassigned to other positions within the company in order to accommodate her inability to speak. There is no evidence in the record that proves that a loss of voice would inhibit claimant's ability to perform mail room work. There is no physician's release indicating claimant should not work, nor testimony from a physician that would suggest that her unilateral decision to stay home was a good one. All we know is that she did not work.

Temporary total disability is defined in K.S.A. 44-510c(b)(2) as follows:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.

There is no evidence within this record that would support claimant's claim that she was temporarily and totally incapable of engaging in any type of substantial and gainful employment during the dates alleged. Not having a voice does not inhibit one's ability to

⁹ R.H. Trans. at 17, referencing exhibit 3.

¹⁰ K.S.A. 2008 Supp. 44-501(a).

¹¹ K.S.A. 2008 Supp. 44-508(g).

do the accommodated job. Had claimant been performing her normal, unaccommodated job as a customer service representative, answering phone calls, then most certainly she would have been incapable of doing her job. But the evidence is that claimant was assigned to the mail room, a place that does not seem to require vocal capabilities.

Under these facts, the Board finds the ALJ's Award denying claimant additional TTD benefits should be affirmed based upon claimant's failure to meet her burden of proof on this issue.

As for the issue of medical bills, the Board finds that the ALJ's decision to order respondent to pay those bills that were incurred as a result of claimant's compensable condition, subject to the statutory fee schedule, should be affirmed. Based upon the Board's earlier decision, claimant sustained a compensable injury and is entitled to medical treatment to treat that injury. Bills have been incurred and to the extent respondent believes they do not comport with the fee schedule, there is an appropriate procedure set forth in the Act for respondent to follow.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award on Remand of Administrative Law Judge Kenneth J. Hursh dated October 28, 2008, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge